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No. 84-427

In the Supreme Court of the United States

OCTOBER TERM, 1984

JANET A. MOORE, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that her complaint should not have been dismissed for failure to exhaust administrative remedies.

1. Petitioner commenced this action in March 1981, seeking damages and declaratory and injunctive relief for her allegedly wrongful separation from employment within the competitive service. Petitioner claimed that she was required to submit to a psychiatric examination and then forced to take leave without pay, in violation of due process and applicable regulations. Pet. App. 3a; Pet. 7-8 n.*.

The dispute arose out of petitioner's declining job performance as a computer specialist for the Department of State. During late 1979 and early 1980, petitioner complained on several occasions to her superiors about the poor air quality in her work area, contending that it caused physical and mental impairments and impeded the proper

execution of her work. An inspection of the room showed that the air quality was satisfactory. Despite this assurance, petitioner repeated her complaints, which led her division chief to suggest that she undergo a fitness-for-duty examination. See Appellees' C.A. Br. App. 27-32. Petitioner agreed, although she contends that her consent to the examination was not voluntary. The examination indicated that she was not fit for employment at that time because of psychiatric difficulties. Petitioner then requested 30 days' sick leave and afterwards applied for three months' leave without pay. She contends that these requests were forced upon her by the unfavorable results of the psychiatric examination. Pet. 3-5. Petitioner was continued on leave-without-pay status after her approved leave expired. On March 23, 1981, shortly after the complaint in this case was filed, petitioner accepted the Department's offer to return to work. Pet. App. 3a; Pet. 8. She has since left to take employment with a private firm. A live controversy still exists with respect to the Department's refusal to expunge the results of the examination from her personnel records and with respect to damages (see *id.* at 9, 12, 18-20).

The Department moved to dismiss the complaint on the ground, inter alia, that petitioner had not exhausted her administrative remedies because she had not appealed to the Merit Systems Protection Board.[1] The district court

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[1]The Department also argued, and the district court agreed (Pet. App. 5a), that the claim for damages against two respondents in their individual capacities must be dismissed for failure to effectuate proper service of process in accordance with Fed. R. Civ. P. 4(d)(1). See *Relf* v. *Gasch*, 511 F.2d 804, 807-808 & n.18 (D.C. Cir. 1975). Petitioner now renounces her *Bivens* claim and argues instead that she seeks damages from these respondents in their official capacities as employees of the Department of State (Pet. 19-20). This new claim is of course barred by sovereign immunity. See *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment). See also *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978).

granted the motion, reasoning that petitioner's claims were within the Board's jurisdiction over adverse personnel actions (Pet. App. 4a). See 5 U.S.C. 7512, 7513(d), 7701. The court further reasoned that petitioner's related due process claim could also be raised on administrative review and might in any event be mooted by a favorable decision on her statutory claim (Pet. App. 4a-5a). Petitioner appealed the dismissal to the court of appeals and appealed the personnel action to the Board; the court of appeals stayed proceedings pending a final decision by the Board. Pet. 9.

The Board dismissed petitioner's appeal for lack of jurisdiction (Pet. App. 7a-10a). It concluded that petitioner had failed to demonstrate the existence of appealable adverse action, because the procedures followed with respect to the fitness-for-duty examination did not in themselves constitute such action (*id.* at 8a) and because petitioner was not placed on enforced leave constituting a constructive suspension (*id.* at 7a).[2] Petitioner's appeal to the United States Court of Appeals for the Federal Circuit from the Board's dismissal is currently pending.

The United States Court of Appeals for the District of Columbia Circuit then affirmed the district court's dismissal of petitioner's complaint "generally for the reasons stated" by the district court (Pet. App. 11a-12a).

2. Petitioner appears to contend (Pet. 10-21) that she has been denied a forum in which to challenge the Department of State's actions in regard to her employment. Petitioner misunderstands the import of the court of appeals' decision. The court simply declined to exercise its jurisdiction as long as administrative relief might be available to petitioner;

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[2]In the course of dismissing the appeal for lack of jurisdiction, the Board's presiding official determined after a three-day hearing that petitioner voluntarily took the fitness-for-duty examination and that she voluntarily requested leave. See Appellees' C.A. Br. App. 16-25.

in light of the pendency of her appeal before the Federal Circuit, this avenue has not yet been foreclosed. Should that court affirm the dismissal of her administrative appeal, petitioner would be free to return to the district court to advance whatever claims have not already been decided, notwithstanding the dismissal of her earlier complaint.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

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[3]Petitioner's damages claim against the individual respondents was properly dismissed on grounds unrelated to exhaustion. See note 1, *supra*. Whether any remaining claims are foreclosed by the decision of the Merit Systems Protection Board (see note 2, *supra*) and whether any open claims have merit (cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983)) need not be addressed at this time.

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